

GIBSON, DUNN & CRUTCHER LLP
MARK A. PERRY (SBN 212532)
mperry@gibsondunn.com
RACHEL S. BRASS (SBN 219301)
rbrass@gibsondunn.com
JULIAN W. KLEINBRODT (SBN 302085)
jkleinbrodt@gibsondunn.com
555 Mission Street, Suite 3000
San Francisco, CA 94105-0921
Telephone: (415) 393-8200
Facsimile: (415) 374-8429

Attorneys for Apple Inc.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

CORONAVIRUS REPORTER, CALID INC.,
on behalf of themselves and all others similarly
situated

Plaintiffs,

V.

APPLE INC., FEDERAL TRADE
COMMISSION,

Defendants.

Case No. 3:21-CV-05567-EMC

DEFENDANT APPLE INC.'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Date: October 14, 2021
Time: 1:30 p.m. PT
Place: Courtroom 5, 17th Floor

The Honorable Edward M. Chen

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I. INTRODUCTION

The App Store has been a remarkable success, growing from a collection of a few hundred apps at its inception in 2008 to a platform providing U.S. consumers access to about 2 million apps across twenty-seven genres. The cornerstone of this success is the safe, reliable, high-quality experience Apple has built for its users. The company has done so by requiring developers to abide by detailed and wide-ranging guidelines governing everything from user privacy to the app's reliability and performance. And to ensure that developers and their apps comply with these guidelines before distributing through the App Store, Apple has built a rigorous app review process that screens every app using Apple's proprietary software and tools.

In early 2020, the COVID-19 pandemic began to spread worldwide. Confronting not only a generational disease but also an unprecedented “infodemic” of misinformation, Apple announced that it had amended its App Review Guidelines to ensure that consumers would receive only credible information from established medical and scientific institutions via the App Store. It explained that it would reject, and in fact has rejected, any and all apps that did not meet these widely available guidelines. That included Plaintiffs’ app—which is not affiliated with any apparent, recognized healthcare institution as Apple’s guidelines required.

Plaintiffs have asserted a raft of legal theories that all, at bottom, complain that Apple erred in rejecting their app pursuant to Apple’s App Review Guidelines. By Plaintiffs’ own admission, “it is reasonable to be concerned” that they “face[] an uphill battle” in this case. Compl. ¶ 7. Among many other things, the developer agreements make clear that Apple retains sole discretion to decide whether apps built using its intellectual property, under license, may be distributed through the App Store. Yet without any evidence, Plaintiffs seek to eviscerate the App Store—an “economic miracle” for developers, customers, and Apple alike—through a breathtaking injunction that would force the company to abandon its business model, re-engineer iOS, relinquish any control over its intellectual property, and perhaps cause physical or mental harm to users. The relief sought would harm developers and customers alike. Even if it would help Plaintiffs (a threshold fact they have not proven), a mandatory injunction like the one sought here is available only in the rarest cases “when ‘extreme or very serious damage will result’ that is not ‘capable of compensation in damages,’ and the merits of

1 the case are not ‘doubtful.’” *Hernandez v. Sessions*, 872 F.3d 976, 999 (9th Cir. 2017). Plaintiffs have
 2 not come remotely close to meeting that burden.

3 First, Plaintiffs have shown no likelihood to succeed on the merits. Their motion focuses on a
 4 tying theory they did not plead (even though they are now on their *fourth* complaint) and for which
 5 they have no standing. They have not alleged, much less proved, the requisite relevant markets,
 6 Apple’s market power in one of those markets, the existence of a tie, or any anticompetitive effects.
 7 And while they have forfeited any ability to seek preliminary injunctive relief on the basis of the claims
 8 they did plead in the operative complaint, each of those claims will fail too as Apple has set forth in its
 9 motion to dismiss. *See Mot. to Dismiss at 6–24.*

10 Nor can Plaintiffs establish irreparable injury. The fact that Plaintiffs waited months—and filed
 11 three complaints in a different judicial district—before seeking any equitable relief demonstrates that
 12 there is no prospect of imminent harm. Even if they could explain this delay, Plaintiffs must show that
 13 the rejection of their app was unlawful *and* that the rejection harmed them *and* that any such harm
 14 could not be rectified by ordinary damages. They have not proved any of these things; indeed, they
 15 have not even tried. Because there is no evidence that monetary relief is “inadequate,” no injunction
 16 may lie. *Herb Reed Enterprises, LLC v. Fla. Ent. Mgmt., Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013).

17 The equities also militate against an injunction. The proposed injunction would impose
 18 enormous burdens on Apple to re-engineer iOS; fundamentally disrupt the way in which Apple and
 19 developers conduct business; endanger Apple’s hard-won brand for safety, security, and reliability; and
 20 put millions of customers at risk. This is not hyperbole: Plaintiffs ask the Court to handcuff Apple
 21 while its platform is used to distribute malware, spyware, pornography, and other malicious, dangerous,
 22 and unsavory apps to millions of consumers, including children. And while Plaintiffs try to justify this
 23 by baldly asserting that their app could “save lives,” they do not even explain what their app does,
 24 much less *prove* that distributing it on the App Store would do more good than harm—particularly in
 25 light of the sophisticated apps and services already made available by health authorities and institutions.

26 And Plaintiffs have failed to post adequate security for their injunctive request, a stand-alone
 27 reason to reject their motion.

1 Because Plaintiffs have utterly failed to establish that “the facts and law clearly favor the
 2 moving party,” the Court should deny the motion for a preliminary injunction. *Garcia v. Google, Inc.*,
 3 786 F.3d 733, 740 (9th Cir. 2015) (en banc).

4 **II. STATEMENT OF FACTS**

5 Plaintiffs have come to this Court with a sweeping request for injunctive relief supported by
 6 exactly *zero* evidence. But this case does not arise in a vacuum; Apple has been litigating challenges
 7 to the App Store business model for several years. Extensive evidence has been adduced that
 8 demonstrates the defects with Plaintiffs’ wholly unsupported motion, including documentary and
 9 testimonial evidence admitted in the *Epic Games v. Apple* trial earlier this year noted in Plaintiffs’
 10 Complaint. *See* Compl. ¶ 7. With some redactions for confidential business and third-party
 11 information, those materials have been publicly available since trial. Indeed, they easily can be
 12 accessed online from the Court’s website and from a public access site maintained by the parties by
 13 Court order.¹ Plaintiffs not only ignore these records in their motion but also fail to reckon with that
 14 evidence’s implications. Apple sets forth the facts below from that and other evidence.

15 A. Apple’s Revolutionary iPhone Ecosystem

16 Apple “reinvent[ed] the phone” when it released the iPhone in June 2007. Decl. of Rachel
 17 Brass Ex. 1. It was a revolution in hardware and software technology, providing access to the internet,
 18 a real web browser, and MultiTouch—features that remain at the core of what the smartphone is today.
 19 Brass Decl. Ex. 2 at 2719:20–2721:6 (*Epic* trial testimony of Apple Fellow, Philip Schiller). While the
 20 original iPhone came preinstalled with a few native apps developed by Apple, native third-party apps
 21 could not be downloaded. *Id.* at 2727:17–19, 2728:18–19 (Schiller).

22 Apple began allowing third-party developers to distribute native apps on iOS through the App
 23 Store in 2008. Brass Decl. Ex. 2 at 2728:24–2729:24 (Schiller). The App Store thus became a two-
 24 sided transaction platform, connecting app developers with customers. Brass Decl. Ex. 3 ¶ 42. As
 25 “world-renowned” economists have explained in parallel litigation, Brass Decl. Ex. 2 at 1909:13, multi-
 26 sided platform businesses are complex. Brass Decl. Ex. 3 ¶ 27. The platform must ensure that there

27
 28 ¹ *See* <https://cand.uscourts.gov/cases-e-filing/cases-of-interest/epic-games-inc-v-apple-inc/>;
<https://app.box.com/s/6b9wmjvr582c95uzma1136exumk6p989>.

1 are a large number of participants on both sides of the platform and that transactions on the platform
 2 are as easy, safe, and reliable as possible. *Id.* ¶¶ 27, 45-46, 122-26. Successful two-sided transaction
 3 platforms must establish pricing strategies, service provisions, and rules of behavior that ensure
 4 balanced participation of the customer groups they serve. *Id.* ¶¶ 28, 122-26.

5 To that end, Apple has adopted a business model that provides a curated ecosystem. Developers
 6 who wish to distribute apps pay a \$99 annual fee to join Apple's Developer Program, agree to pay a
 7 commission on some paid transactions, and promise to abide by Apple's App Review Guidelines.
 8 Brass Decl. Ex. 2 at 2759:22–2760:9, 2761:21–25 (Schiller), Ex. 4, Ex. 5.² In return, developers are
 9 licensed to use Apple's proprietary software and tools—including the software development kits
 10 (SDKs) and thousands of application program interfaces (APIs)—that are protected by patent,
 11 copyright, and trademark laws. Brass Decl. Ex. 2 at 2757:9–2758:8 (Schiller) & Ex. 9 ¶ 23. Apple
 12 also reviews every app developed using its intellectual property before distribution on the App Store
 13 to ensure it complies with the company's guidelines. Brass Decl. Ex. 2 at 2835:10–15 (Schiller). These
 14 guidelines protect users from apps that would invade their privacy, compromise the reliability of their
 15 devices, or expose them to malicious software. Brass Decl. Ex. 6 ¶ 59 & Ex. 7. They also increase the
 16 quality of available apps to consumers while simultaneously protecting developers from low-quality
 17 copycats. Brass Decl. Ex. at 7 at 9, 22. Today, consumers enjoy free access to an enormous library of
 18 safe, secure apps—83% of which are free—across twenty-seven different categories, and developers
 19 in turn have access to an enormous audience of potential customers that can trust the apps available for
 20 download. Brass Decl. Ex. 2 at 1076:17–1077:3; 1085:1–12 (*Epic* trial testimony of Apple's Senior
 21 Director of App Review, Trystan Kosmynka), Ex. 3 ¶¶ 24, 26, 50–51, Ex. 8 ¶ 169.

22

23 ² In their motion, Plaintiffs wrongly assert (without evidence) that Apple charges developers a 35%
 24 commission. Mot. ¶ 9. At most, Apple charges a 30% commission; some transactions incur a
 25 smaller commission, and the vast majority of transactions incur no commission at all. *See* Brass
 26 Decl. Ex. 8 ¶ 169 (83% of apps with at least one download are free) & Ex. 2 at 2767:8–17 (Schiller)
 27 (Apple collects no commission on free apps). Indeed, inaccurate assertions are endemic to
 28 Plaintiffs' motion. *See, e.g.*, Mot. ¶ 40 (wrongly asserting that no other computing platforms have
 used a walled garden model); *id.* ¶ 56 (misrepresenting Apple's App Store revenues). This is one
 reason that courts require evidence rather than attorney argument in connection with applications
 for relief. *See Societe Comptoir De L'Industrie Cotonniere, Etablissements Boussac v. Alexander's
 Dep't Stores, Inc.*, 190 F. Supp. 594, 601–02 (S.D.N.Y. 1961) (court may "consider only facts
 presented by affidavit or testimony" to support a "restraint put upon the defendant at a time before
 his liability has actually been adjudged").

1 By any measure, the App Store has thus been a phenomenal success for developers and
 2 consumers alike. Output has soared: The number of apps, number of app transactions, and amount of
 3 revenue earned by developers has skyrocketed since the App Store's inception. Brass Decl. Ex. 8
 4 ¶¶ 182-83, Ex. 9 ¶ 121, Ex. 25. Apple has outpaced its competitors in protecting consumers' privacy.
 5 Brass Decl. Ex. 6 ¶ 44; *see also* Brass Decl. Ex. 2 at 1119:2-6 (*Epic* trial testimony of Mr. Kosmynka
 6 discussing Apple's rejections of hundreds of thousands of app submissions for violating privacy
 7 standards), 2830:25-2831:3 (*Epic* trial testimony of Mr. Schiller, discussing some of Apple's
 8 innovations to protect consumer privacy), 3848:22-3849:7 (*Epic* trial testimony of Apple's CEO, Tim
 9 Cook, discussing consumer surveys reflecting the importance of privacy to consumers when choosing
 10 Apple). Apple's ecosystem also remains secure: The iPhone platform accounted for just 0.85% of
 11 malware infections in 2018 compared to 47.15% for Android and 35.82% for Windows. Brass Decl.
 12 Ex. 12; *see also* Brass Decl. Exs. 10-11 (showing that Android app stores have significantly higher
 13 numbers of malicious apps than the App Store). Even Apple's litigation adversaries have conceded
 14 that Apple's security is peerless, Brass Decl. Ex. 2 at 2708:13-17 (*Epic* trial testimony of Epic's expert,
 15 Dr. James Mickens), and that they prefer Apple devices for their superior privacy, *id.* at 302:22-303:4
 16 (*Epic* trial testimony of Tim Sweeney, Epic's CEO, about the reasons for preferring the iPhone over
 17 competitor devices). In Tim Cook's words, the App Store is "an economic miracle," sustaining
 18 "almost 2 million people in the U.S. around the iOS job economy." *Id.* at 3860:20-24 (Cook).

19 **B. In the Face of a Pandemic and "Infodemic," Apple Ensures that Only Recognized
 20 Health Entities Can Distribute Apps Related to COVID-19**

21 In early 2020, the COVID-19 virus began sweeping across the world. *See, e.g.*, Bill Chappell,
 22 *Coronavirus: COVID-19 Is Now Officially a Pandemic, WHO Says*, NPR (Mar. 11, 2020),
 23 <https://tinyurl.com/3mcb6r96>. That generational health crisis was accompanied by an "infodemic"—
 24 the rampant proliferation of false, misleading, and dangerous information about the pandemic. *See,*
 25 *e.g.*, Matt Richtel, *W.H.O. Fights a Pandemic Besides Coronavirus: An 'Infodemic'*, N.Y. Times (Feb.
 26 6, 2020), <https://tinyurl.com/69bfjj3c>. Such misinformation presented a significant public health
 27 threat. *See, e.g.*, Sarah Evanega, et al., *Coronavirus Misinformation: Quantifying Sources and Themes
 28 in the COVID-19 'Infodemic'* at 12 (Oct. 2020).

1 Consistent with its commitment to making the App Store a safe and trusted place for
 2 downloading apps, Apple sought to address these twin threats by critically evaluating apps related to
 3 the COVID-19 pandemic. Brass Decl. Ex. 13. As Apple explained:

4 Communities around the world are depending on apps to be credible news sources —
 5 helping users understand the latest health innovations, find out where they can get help if
 needed or provide assistance to their neighbors.

6 To help fulfill these expectations, we're evaluating apps critically to ensure data sources
 7 are reputable and that developers presenting these apps are from recognized entities such
 as government organizations, health-focused NGOs, companies deeply credentialed in
 8 health issues, and medical or educational institutions. Only developers from one of these
 recognized entities should submit an app related to COVID-19.

9 *Id.* In addition, Apple revised its App Review Guidelines to provide that “[a]pps that provide services
 10 in highly-regulated fields (such as banking and financial services, healthcare, gambling, and air travel)
 11 or that require sensitive user information should be submitted by a legal entity that provides the
 12 services, and not by an individual developer.” Brass Decl. Ex. 7 § 5.1.1(ix).

13 C. Apple Rejects the “Coronavirus Reporter” App for Violating Its Guidelines

14 Plaintiffs CALID Inc. and Coronavirus Reporter allege they are Wyoming corporations.
 15 Compl. ¶¶ 41–42. Despite bearing the burden of proof, Plaintiffs have submitted no evidence
 16 concerning the nature of their businesses or the identity of their shareholders. Indeed, Plaintiffs have
 17 not even filed the required Rule 7.1 Corporate Disclosure Statement and Local Rule 3-15 Certificate
 18 of Interested Entities that would allow the Court and Apple to understand who is driving this litigation,
 19 and who has a financial interest in its outcome. Relying then on corporate records, Coronavirus
 20 Reporter Corp. was incorporated by GG Group Inc., a Nevada corporation, and CALID Inc. was
 21 incorporated by GG International, Inc., a Nevada commercial registered agent. Brass Decl. Exs. 14–
 22 15.

23 The Complaint alleges that CALID focuses on developing videoconferencing technology—not
 24 providing healthcare services. Compl. ¶ 42. Neither GG Group nor GG International appears to
 25 provide health services either. Plaintiffs’ only apparent connection to health or medicine is that Jeffrey
 26 Isaacs is CALID’s CEO. Brass Decl. Ex. 16; *see also* Kosmynka Decl. Ex. A (reflecting repeated
 27 communications by Mr. Isaacs on behalf of CALID). Mr. Isaacs is a former physician “who suffers
 28 from a neuropsychiatric illness.” *Isaacs v. Arizona Bd. of Regents*, 608 F. App’x 70, 72 (3d Cir. 2015).

1 The New Hampshire Board of Medicine revoked his medical license in 2014 for his failure to disclose
 2 material facts. Brass Decl. Ex. 17. Since that time, Mr. Isaacs has waged an unsuccessful litigation
 3 campaign across federal courts. *See, e.g., Isaacs v. USC Keck Sch. of Med.*, 846 F. App'x 519, 520
 4 (9th Cir. 2021) (affirming attorney's fees against Mr. Isaacs for violating a settlement agreement);
 5 *Isaacs v. Trustees of Dartmouth Coll.*, No. 18-1560, 2019 WL 10837707, at *1 (1st Cir. Jan. 3, 2019)
 6 (affirming dismissal of case challenging New Hampshire Board of Medicine's disciplinary action);
 7 *Isaacs v. Dartmouth Hitchcock Med. Ctr.*, No. CV198000DSFRAOX, 2020 WL 3096529, at *4 (C.D.
 8 Cal. Feb. 3, 2020) (dismissing case challenging various disciplinary and termination decisions); *Isaacs*
 9 *v. U.S. Dept. of Edu.*, No. 17-11221-FDS, Dkt. 61 (D. Mass. Mar. 8, 2019) (upholding agency's
 10 rejection of petition to discharge student loans).

11 Plaintiffs assert in their motion that they developed "five apps over five years." Mot. ¶ 20.
 12 Aside from the "Coronavirus Reporter" app, Plaintiffs do not identify any apps they developed related
 13 to health or medicine. Their motion instead claims that they developed "videoconference apps,
 14 telecommunications references, and games," *id.* ¶ 48, none of which are named. The Complaint
 15 suggests one app is "CALendar IDentifier." Compl. ¶ 42. But Plaintiffs have refused Apple's request
 16 to confirm this, identify any of the other apps they mention, or even name the relevant developer
 17 accounts. Brass Decl. ¶ 21 & Ex. 18.

18 For the single app on which Plaintiffs' motion is premised, Apple has been able to identify
 19 some information from its internal records. For example, a correspondence log shows that CALID
 20 submitted the Coronavirus Reporter app for review in March 2020. Kosmynka Decl. Ex. A. Although
 21 the Complaint implies that Coronavirus Reporter Corp. developed this app, Compl. ¶ 41, Apple's
 22 records show that CALID is the developer of record. Kosmynka Decl. Ex. A. Because CALID was
 23 not a recognized healthcare institution, Apple rejected the Coronavirus Reporter app pursuant to its
 24 guidelines. Kosmynka Decl. ¶ 8 & Ex. A; *accord* Compl. ¶¶ 14-16.

25 CALID appealed to Apple's App Review Board, an internal body that can review rejections
 26 made by Apple's frontline reviewers. Kosmynka Decl. ¶¶ 9-10 & Ex. A. This review confirmed that
 27 the Coronavirus Reporter app did not comply with Section 5.1.1 of Apple's App Review Guidelines.
 28 *Id.* As Apple explained:

We found in our review that your app related to the COVID-19 pandemic provides healthcare services or requires sensitive user information. In addition, **the seller and company names associated with your app are not from a recognized institution**, such as a governmental entity, hospital, insurance company, non-governmental organization, or university. [S]ection 5.1.1 (ix) of the App Store Review Guidelines, apps that provide services or collect sensitive user information in highly regulated fields should be submitted by a legal entity that provides these services, and not by an individual developer. Next Steps[.] To resolve this issue, your app must be published under a seller and company name of a recognized institution that provides healthcare services.

Kosmynka Decl. Ex. A (emphasis added). The review board also uncovered additional software bugs and design flaws that violated other guidelines. Kosmynka Decl. ¶ 10 & Ex. A. The App Review Board therefore upheld the rejection of the app, *id.*, but encouraged CALID to “mak[e] the appropriate revisions to your app and resubmit.” Kosmynka Decl. Ex. A.

CALID did not make the identified revisions; instead, on March 19, 2021, it sought to overturn this decision a second time by asserting a collaboration with a Dr. Robert Roberts. Kosmynka Decl. Ex. A. But Apple explained that “working with healthcare professionals” did not satisfy the App Review Guidelines. *Id.* As Apple told CALID, “your app contains information related to the COVID-19 pandemic, but the seller and company names associated with your app are not from a recognized institution”; “your app presents user-generated data that has not been vetted for accuracy by a reputable source”; and “[g]iven the sensitivity around this personal health information, there is a potential for the app to be used in a malicious way which can spread misinformation.” *Id.* Apple again encouraged CALID to bring the Coronavirus Reporter into compliance with the App Store Review Guidelines and submit it for review. *Id.* CALID did not do so. Kosmynka Decl. ¶ 15.

D. Plaintiffs Sue in January 2021, Evade a Determination on the Merits, and Wait Seven Months to Move for a Sweeping Preliminary Injunction

This litigation began more than seven months ago on January 19, 2021, when Coronavirus Reporter filed a predecessor action in the District of New Hampshire. *Coronavirus Reporter v. Apple, Inc.*, No. 21-cv-47, Dkt. 1 (D.N.H.). Apple repeatedly moved to dismiss that case, but Coronavirus Reporter evaded any adjudication on the merits by twice amending its complaint. *Coronavirus Reporter v. Apple, Inc.*, No. 21-cv-47, Dkts. 10, 17, 26, 27, 32 (D.N.H.). Before the court could rule on Apple’s most recent motion to dismiss, it ordered the case transferred under the contractual forum-

1 selection clause in Apple’s Developer Program License Agreement. *Coronavirus Reporter v. Apple, Inc.*, No. 21-cv-47, Dkts. 10, 26, 32 (D.N.H.).

3 Before the District of New Hampshire’s clerk could begin the transfer, Coronavirus Reporter
 4 voluntarily dismissed its claims. *Coronavirus Reporter v. Apple, Inc.*, No. 21-cv-47, Dkt. 40 (D.N.H.).
 5 Plaintiffs then filed suit in this Court on July 20, 2021. Dkt. 1. As with their prior complaints, Plaintiffs
 6 have stitched together allegations from other pending lawsuits against Apple. *See Mot. to Dismiss at*
 7 8 n.5. They also added new parties—CALID as a plaintiff and the Federal Trade Commission as a
 8 defendant (although apparently the FTC has not been served)—as well as a racketeering claim. *See id.*
 9 at 5. But for almost three weeks after filing the complaint in this Court, Plaintiffs did not seek a
 10 temporary restraining order or any other preliminary relief. Nor did Coronavirus Reporter ever seek
 11 such relief during the six months of litigation in New Hampshire.

12 Although Plaintiffs do not contend Apple has taken any new action against Plaintiffs since they
 13 first filed suit in January—or, indeed, since Apple rejected the Coronavirus Reporter app in March
 14 2020—they now move for a preliminary injunction. The scope of their request is extraordinary.
 15 Plaintiffs ask the Court to fundamentally change Apple’s business model by compelling Apple to
 16 license its intellectual property for free, Dkt. 20-1 ¶ d, while simultaneously precluding the company
 17 from “[b]locking, rejecting or banning *any* App Store third-party developer app for any reason” except
 18 those that violate “local, state, national, and/or global laws and treatises [sic]” or “could reasonably
 19 likely cause device malfunction, incomplete execution, or device failure,” *id.* ¶ c. In addition, Plaintiffs
 20 ask the Court to compel Apple to re-engineer iOS itself, *id.* ¶¶ a-b, and relinquish any control over its
 21 intellectual property to unnamed “governmental level” authorities, *id.* ¶ c. These requests, if ordered
 22 by the Court, would materially impair Apple’s ability to offer high-quality apps to customers. *See*
 23 Brass Decl. Ex. 2 at 3884:18–3886:1 (Cook) (discussing the implications of similar aspects of the
 24 proposed permanent injunction in *Epic*).

25 Plaintiffs submit *no evidence* in support of their motion.

26 **III. LEGAL STANDARD**

27 A preliminary injunction is “an extraordinary remedy never awarded as of right.” *Winter v.*
 28 *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). The plaintiff must make a “clear showing” that (1)

1 “he is likely to succeed on the merits,” (2) “he is likely to suffer irreparable harm in the absence of
 2 preliminary relief,” (3) “that the balance of equities tips in his favor,” and (4) “that an injunction is in
 3 the public interest.” *Id.* at 20. This burden is “heavy.” *Earth Island Inst. v. Carlton*, 626 F.3d 462,
 4 469 (9th Cir. 2010). And the plaintiff must rely on “[e]vidence that goes beyond the unverified
 5 allegations of the pleadings,” 11A Charles Alan Wright, et al., Fed. Prac. & Proc. Civ. § 2949 (3d ed.);
 6 “conclusory factual assertions and speculative arguments that are unsupported in the record” do not
 7 suffice. *Scholl v. Mnuchin*, 494 F. Supp. 3d 661, 682 (N.D. Cal. 2020); *see also Herb Reed Enterprises,*
 8 *LLC v. Fla. Ent. Mgmt., Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013) (district court abuses its discretion
 9 “by relying on ‘unsupported and conclusory statements’” instead of “evidence”). Because mandatory
 10 injunctions like the one sought in this case are “particularly disfavored,” Plaintiffs’ burden here “is
 11 doubly demanding.” *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc).

12 IV. ARGUMENT

13 Long before Plaintiffs filed this suit, a multi-billion-dollar app developer, Epic Games, Inc.,
 14 commenced an assault upon the App Store business model. Brass Decl. Ex. 2 at 152:19–153:11,
 15 279:19–280:3 (Sweeney). Devoting what Judge Gonzalez Rogers would call unlimited time and
 16 money, Epic spent over a year developing its litigation strategy with one of the top law firms in the
 17 country. *Id.* at 501:2–5. In that case, Epic filed a motion for preliminary injunction supported by fact
 18 and expert declarations as well as dozens of Apple documents. *Epic Games, Inc. v. Apple Inc.*, No.
 19 4:20-CV-05640-YGR, Dkt. 61 (N.D. Cal. Sept. 4, 2020). After a hearing, Judge Gonzalez Rogers
 20 denied Epic’s motion because, among other things, Epic had not demonstrated that it was likely to
 21 succeed on its claims at the “frontier edges of antitrust law.” *Epic Games, Inc. v. Apple Inc.*, 493 F.
 22 Supp. 3d 817, 833 (N.D. Cal. 2020). Thereafter, the parties exchanged millions of documents in
 23 discovery, participated in almost 50 depositions, and served thousands of pages of expert reports and
 24 supporting exhibits. Brass Decl. ¶ 2. In May 2021, Judge Gonzalez Rogers presided over a three-week
 25 trial on those claims that produced over 800 exhibits—the vast majority of which were quickly posted
 26 online for public review and use—and a 4,210 page transcript capturing testimony from not only
 27 Apple’s CEO Tim Cook but also the leaders of Apple’s App Store business. *Id.* ¶ 3. No decision has
 28 been issued. *Id.*

1 Plaintiffs acknowledge none of this history in their motion. Yet they ask this Court to skip
 2 ahead to a different outcome even though they have tarried sixteen months after their app was rejected
 3 and through at least seven months of litigation, have submitted no evidence to support their motion,
 4 and have failed to even articulate a coherent or consistent theory of their own case. If Epic's claims
 5 represent the frontier, Plaintiffs' claims are in the hinterlands. There is neither a legal nor factual basis
 6 to undo Apple's entire App Store business model, and Plaintiffs' motion should be denied.

7 **A. Plaintiffs Are Unlikely To Succeed On the Merits**

8 None of Plaintiffs' claims will succeed. To start, "the court can consider only facts presented
 9 by affidavit or testimony and cannot consider facts . . . [alleged in] the complaint but which have not
 10 been proved." *Societe Comptoir De L'Industrie Cotonniere, Etablissements Boussac v. Alexander's
 11 Dept. Stores, Inc.*, 190 F. Supp. 594, 601 (S.D.N.Y. 1961). Accordingly, Plaintiffs "needed to
 12 submit *proof* sufficient to show [they have] a strong chance of success on the merits." *Cutting Edge
 13 Sols., LLC v. Sustainable Low Maint. Grass, LLC*, No. 14-CV-02770-WHO, 2014 WL 5361548, at *8
 14 (N.D. Cal. Oct. 20, 2014) (emphasis added). Their failure to offer *any* evidence supporting their claims
 15 is fatal. *Elias v. Connell*, 908 F.2d 521, 526 (9th Cir. 1990).³

16 Yet Plaintiffs' claims would fail even if taken at face value. They focus on an unalleged tying
 17 for which they cannot meet any element of their burden—much less all of them. Nor is there any merit
 18 to Plaintiffs' other claims. On this basis alone, the Court should deny Plaintiffs' motion. *See Ass'n
 19 des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 944 (9th Cir. 2013) (no
 20 injunction can issue where plaintiff fails to show a "likelihood of success on the merits"); *Garcia v.
 21 Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc) (similar).

22
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 25
 26 ³ Plaintiffs cannot cure this deficiency in reply as "courts typically do not consider new evidence first
 27 submitted in a reply brief." *Crandall v. Starbucks Corp.*, 249 F. Supp. 3d 1087, 1104 (N.D. Cal.
 28 2017). Any such sandbagging also would violate the basic principle that "the party opposing the
 application [for a preliminary injunction must be given] notice and an adequate opportunity to
 respond." 11A Charles Alan Wright, et al., Fed. Prac. & Proc. Civ. § 2949 (3d ed.); *see also*
Marshall Durbin Farms, Inc. v. National Farmers Organization, Inc., 446 F.2d 353 (5th Cir. 1971)
 (vacating injunction entered upon affidavits submitted at hearing).

1 **1. Plaintiffs Are Unlikely To Succeed on Their Unpledged Tying Claim**

2 In their motion for a preliminary injunction, Plaintiffs argue that they are likely to succeed on
 3 only one claim: A supposed tie of “the App Store” to “the smartphone enhanced internet access device
 4 market.” Mot. ¶ 38. In other words, Plaintiffs appear to contend that Apple violated Section 2 of the
 5 Sherman Act by tying the App Store to the iPhone device. *See id.* ¶¶ 21, 38. This argument diverges
 6 from the tying theory advanced in the Complaint, which asserts a tie between In-App Purchase and the
 7 App Store. Compl. ¶ 259. That is reason enough to deny the motion. *See Chase v. McMasters*, 405
 8 F. Supp. 1297, 1302 (D.N.D. 1975) (“[I]n deciding whether to grant a preliminary injunction,” courts
 9 are “limited to examining the validity of the legal theories presented in the complaint.”). In any event,
 10 Plaintiffs have failed to establish the existence of a tying arrangement under this new theory, much less
 11 proven up the required elements under the rule of reason. *See United States v. Microsoft Corp.*, 253
 12 F.3d 34, 84 (D.C. Cir. 2001) (rule of reason governs “tying arrangements involving platform software
 13 products”); *Fed. Trade Com'n v. Qualcomm Inc.*, 969 F.3d 974, 990 (9th Cir. 2020) (rule of reason
 14 applies to “[n]ovel business practices—especially in technology markets”).

15 First, Plaintiffs cannot establish antitrust injury—a “threshold requirement.” *Somers v. Apple, Inc.*, 729 F.3d 953, 964 n.5 (9th Cir. 2013). Even crediting Plaintiffs’ unsupported assertions, the only
 16 injury is a reduction in *consumers’* choice “amongst third-party applications.” Mot. ¶ 39. Plaintiffs
 17 identify no injury to developers like themselves. *See Somers*, 729 F.3d at 963 (antitrust injury requires
 18 “an injury to the plaintiff”). Indeed, Plaintiffs do not even contend that they compete in either of the
 19 allegedly relevant markets: They do not seek to offer a competing app store in the supposedly tied
 20 market nor do they offer a competing “bundle of hardware and software” to the iPhone in the purported
 21 “smartphone enhanced internet access device” tying market. Mot. ¶¶ 21, 38; *see also Glen Holly Entm’t, Inc. v. Tektronix, Inc.*, 352 F.3d 367, 372 (9th Cir. 2003) (no antitrust injury unless the plaintiff
 22 is a “participant in the same market as the alleged malefactor”); *Ass’n of Wash. Pub. Hosp. Dists. v. Philip Morris Inc.*, 241 F.3d 696, 705 (9th Cir. 2001) (same); *Or. Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957, 966 (9th Cir. 1999) (same).

23 Second, Plaintiffs have failed to substantiate a “smartphone enhanced internet access device
 24 market.” It is unclear who the buyers and sellers are in this market, which products are included, why
 25

1 other products are excluded, and whether those boundaries rest upon economic evidence of cross-
 2 elasticity and reasonable interchangeability. *See Sumotext Corp. v. Zoove, Inc.*, No. 16-CV-01370-
 3 BLF, 2016 WL 6524409, at *3 (N.D. Cal. Nov. 3, 2016) (dismissing antitrust claims because “the
 4 allegations of the relevant market [were] unclear”). As but one example, Plaintiffs appear to limit the
 5 market to smartphone devices, yet tablets also are purchased as a “hardware and software bundle” and
 6 allow consumers to download and use apps. Compl. ¶ 30; *see also Pistacchio v. Apple Inc.*, No. 4:20-
 7 CV-07034-YGR, 2021 WL 949422, at *2 (N.D. Cal. Mar. 11, 2021) (rejecting alleged market that
 8 failed to explain the exclusion of potential substitutes).

9 *Third*, Plaintiffs are unlikely to prove Apple exercises monopoly power in this market. *See*
 10 *Qualcomm Inc.*, 969 F.3d at 990 (Section 2 requires proof of monopoly power). Apple competes
 11 against many smartphone makers. *See* Compl. ¶ 30 (acknowledging other companies make
 12 “interchangeable” devices). And while Plaintiffs assert that Apple “controls nearly 80% of the
 13 commerce transactions that occur over this device group,” Mot. ¶ 21, that figure has no basis in
 14 evidence. Public estimates peg Apple’s share of U.S. app revenue around 40% and U.S. smartphone
 15 sales around 50%. Brass Decl. Ex. 19 at 4–5 (estimating the App Store facilitated \$138 billion of about
 16 \$340 billion in the “app economy”) & Ex. 20 (reflecting quarterly shares for U.S. smartphone sales
 17 between 40-65% in 2020 and 2021); *see also Kolon Indus. Inc. v. E.I. DuPont de Nemours & Co.*, 748
 18 F.3d 160, 174 (4th Cir. 2014) (the “Supreme Court has never found a party with less than 75% market
 19 share to have monopoly power”); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir.
 20 1945) (90% market share is “enough” but 60–64% market share is “doubtful”). Yet even if Plaintiffs’
 21 unexplained assertion regarding market share were correct and substantiated, that would not establish
 22 monopoly power. *See Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1439 (9th Cir. 1995) (“A
 23 mere showing of substantial or even dominant market share alone cannot establish market power
 24 sufficient to carry out a predatory scheme.”). Plaintiffs fail to argue, much less show, that entry barriers
 25 prevent Apple’s competitors—including Android behemoths like Google, Amazon, Microsoft,
 26 Samsung, LG, and many others—from competing effectively. *See id.* at 1434.

27 *Fourth*, Plaintiffs cannot establish the “most fundamental requirement” of any tying claim:
 28 “[T]he existence of a tie” between two separate products. *Aerotec Int’l, Inc. v. Honeywell Int’l, Inc.*,

1 836 F.3d 1171, 1178 (9th Cir. 2016). Under their own theory, “[c]onsumers purchase [a] hardware and
 2 software bundle from Apple” that includes the “free apps [preinstalled] with the iPhone”—including
 3 the App Store app. Mot. ¶ 21. Neither the hardware nor software in this “bundle” work without one
 4 another. The supposedly tied product is thus nothing more than an integrated component of the alleged
 5 tying product. *See Rick-Mik Enterprises, Inc. v. Equilon Enterprises LLC*, 532 F.3d 963, 974 (9th Cir.
 6 2008) (tying claim failed because “component[s]” of a “bundled” product were not separate). Indeed,
 7 the App Store has been preloaded onto iOS from its inception. Brass Decl. Ex. 21 at 0880.20; *see also*
 8 *Kaufman v. Time Warner*, 836 F.3d 137, 142 (2d Cir. 2016) (no tie existed where the two alleged
 9 products had never been sold separately).

10 *Fifth*, Plaintiffs have failed to offer any evidence that the alleged tie “has a substantial and
 11 anticompetitive effect that harms consumers” in the relevant tied product market. *Qualcomm Inc.*, 969
 12 F.3d at 991. Plaintiffs at most assert that “[c]ustomers are presented with less selection and
 13 competition.” Mot. ¶ 39. “But missing from this record is any such evidence.” *Herb Reed Enters.*,
 14 736 F.3d at 1250. It is far from certain that consumers would have access to more quality apps if Apple
 15 could not centralize distribution through the App Store. For one, a fractured system with many
 16 competing app stores would require developers to meet any number of competing—and potentially
 17 conflicting—requirements, diverting resources toward making more versions of the same app rather
 18 than improving the apps themselves. And if Apple could not subject apps to review prior to
 19 distribution, as Plaintiffs seek, the market could become flooded with malware, offensive content, and
 20 other kinds of low quality apps. *See* Brass Decl. Ex. 3 ¶¶ 29, 120 (explaining how an uncurated
 21 environment could become less desirable to users and developers, leading to a decline in the user and
 22 developer base). All of this would harm consumers or developers, and Plaintiffs’ “speculation” cannot
 23 establish otherwise. *Herb Reed Enters.*, 736 F.3d at 1250.

24 **2. Plaintiffs’ Other Antitrust Claims Are Likely to Fail on Multiple Grounds**

25 Plaintiffs offer no cogent argument in their motion that they are likely to succeed on any of the
 26 other claims pleaded in their complaint and have therefore forfeited any ability to seek preliminary
 27 injunctive relief on the basis of those claims—notwithstanding their purported reservation to assert
 28 otherwise in the future. Mot. ¶ 46; *see also*, e.g., *Pham v. Fin. Indus. Regul. Auth. Inc.*, No. C-12-6374

1 EMC, 2013 WL 1320635, at *2 (N.D. Cal. Apr. 1, 2013) (plaintiffs waive argument that they do not
 2 make in their opening brief). In any event, each of those claims fail on the face of the Complaint for
 3 the reasons set forth in Apple’s motion to dismiss. *See Mot. to Dismiss* at 6–24. Given Plaintiffs’
 4 election not to rely on these claims in their motion for a preliminary injunction, and to avoid burdening
 5 the Court with repetitive arguments, Apple adopts those arguments by reference here.

6 In addition, Plaintiffs cannot show that they are likely to defeat Apple’s legitimate business
 7 justifications. *See Oahu Gas Service, Inc. v. Pacific Resources Inc.*, 838 F.2d 360, 369 (9th Cir. 1988)
 8 (there can be no “antitrust liability if there was a legitimate business justification” for the defendant’s
 9 conduct); *City of Vernon v. S. Cal. Edison Co.*, 955 F.2d 1361, 1366–68 (9th Cir. 1992) (plaintiff “has
 10 the burden of proving that the defendant acted without a legitimate business justification”). To combat
 11 the virulent misinformation that accompanied the spread of the COVID-19 pandemic, Apple restricted
 12 apps related to the pandemic to recognized entities such as government organizations, health-focused
 13 NGOs, companies deeply credentialed in health issues, and medical or educational institutions. Brass
 14 Decl. Ex. 13; Kosmynka Decl. ¶ 5. The antitrust laws do not condemn efforts to improve the credibility
 15 and reliability of public health information. *See Cal. Comp. Prod., Inc. v. Int’l Bus. Machines Corp.*,
 16 613 F.2d 727, 744 (9th Cir. 1979) (improving quality of product was legitimate business justification).

17 Without any evidence, Plaintiffs argue that Apple’s COVID-19 policy was pretextual. Mot.
 18 ¶¶ 10, 46. But Plaintiffs’ apparent disagreement about the wisdom of Apple’s decision does not
 19 establish pretext. Any firm is free to make decisions that “are consistent with the quality and image it
 20 wishes to project for its products.” *Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186, 189 (2d
 21 Cir. 1992); *see also Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406,
 22 1413 (7th Cir. 1995) (a firm may take measures to “maintain[] a reputation for high quality by being
 23 selective about the [developers] to whom it entrusts its customers”). Apple decided to prioritize public
 24 health and safety by restricting the sources of potential misinformation, and applied that standard to
 25 the apps in question. Brass Decl. Ex. 13; Kosmynka Decl. ¶ 5. That is not pretextual, and Plaintiffs
 26 have no evidence (or even argument) to the contrary.

27 Nor is there any evidence to support Plaintiffs’ argument that Apple rejected their app to
 28 “favor[]” its own. Mot. ¶ 9. That would not defeat Apple’s defense even if true. *See Morris Commc ’ns*

1 *Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1296-98 (11th Cir. 2004) (evidence that a defendant was
 2 primarily pursuing its best financial interest is not enough to overcome proof that a restraint was
 3 supported by a legitimate business justification). But Plaintiffs are wrong. Apple has approved more
 4 than 1,500 COVID-19 apps from recognized entities. Kosmynka Decl. ¶ 6. Just as for other apps that
 5 did not comply with Apple’s policy, *id.*, app reviewers determined that Plaintiffs failed to comply with
 6 Apple’s guidelines and explained as much to Plaintiffs. *Id.* ¶ 8. As explained to Plaintiffs at the time,
 7 their asserted partnership with certain doctors was not enough; there is no evidence that either
 8 Coronavirus Reporter Corp. or CALID Inc. are recognized, institutional healthcare providers.
 9 Kosmynka Decl. ¶¶ 11–13 & Ex. A; *see also* Mot. ¶ 48 (arguing that Plaintiffs developed also
 10 “videoconference apps, telecommunications references, and games”). Indeed, Apple did not even have
 11 any anticompetitive incentive to self-preference: Apple’s contact-tracing software—developed in
 12 conjunction with Google to help governments and health agencies reduce the spread of COVID-19
 13 while preserving user privacy and security—was provided for free, and Apple even released its draft
 14 technical documentation to the public. *See* Brass Decl. Exs. 22–23 (describing free app developed by
 15 Apple in conjunction with the CDC to provide credible information about COVID-19).

16 Plaintiffs are not likely to prevail on any one of the claims they assert here, and on that basis,
 17 the Court should deny the motion.

18 **B. Plaintiffs Have Not Proven a Risk of Irreparable Harm**

19 To obtain a preliminary injunction, a plaintiff also “must establish that irreparable harm is
 20 likely, not just possible.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).
 21 Again, Plaintiffs’ arguments fail at the gate given the total absence of proof. *See Herb Reed*
 22 *Enterprises, LLC v. Fla. Ent. Mgmt., Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013) (vacating injunction
 23 because a plaintiff cannot establish a risk of irreparable harm without evidence); *Am. Passage Media*
 24 *Corp. v. Cass Comm’ns, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985) (same). But even setting this aside,
 25 none of their contentions—even if credited—justify a preliminary injunction. *See Diversified Silicone*
 26 *Products Corporation v. Elastapro Silicone Sheeting LLC*, No. CV 20-2010 PSG, 2020 WL 4390380,
 27 at *2 (C.D. Cal. 2020) (failure to establish irreparable injury is “dispositive” to request for preliminary
 28

1 injunction); *Tech. & Intellectual Prop. Strategies Grp., PC v. Fthenakis*, No. C 11–2373 MEJ, 2012
 2 WL 159585, at *4 n.6 (N.D. Cal. Jan. 17, 2012) (same).

3 To start, there is no “presumption” of irreparable harm as Plaintiffs suggest. Mot. ¶ 47. That
 4 presumption arises when the government demonstrates that a merger likely violates Section 7 of the
 5 Clayton Act. *United States v. Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980); *see also F.T.C. v.*
 6 *Weyerhaeuser Co.*, 665 F.2d 1072, 1082 (D.C. Cir. 1981) (explaining that government agencies are not
 7 always “held to the high thresholds applicable where private parties seek interim restraining orders”).
 8 To the contrary, Plaintiffs’ seven-month delay in seeking an injunction “implies a lack of urgency and
 9 irreparable harm.” *Miller v. Cal. Pac. Med. Ctr.*, 991 F.2d 536, 544 (9th Cir. 1993); *see also Lydo*
 10 *Enter., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) (because “[a] preliminary
 11 injunction is sought upon the theory that there is an urgent need for speedy action to protect the
 12 plaintiffs rights,” a plaintiff who “sleep[s] on its rights . . . demonstrates the lack of need for speedy
 13 action”). Indeed, many courts have concluded that similar—or even shorter—delays are inconsistent
 14 with an assertion of irreparable harm. *See, e.g., Valeo Intellectual Prop. v. Data Depth Corp.*, 368 F.
 15 Supp. 2d 1131, 1128 (W.D. Wash. 2005) (three-month delay); *Tough Traveler. Ltd. v. Outbound*
 16 *Prods.*, 60 F.3d 964, 969 (2d Cir. 1995) (four-month delay); *Playboy Enters., Inc. v. Netscape*
 17 *Commc'n Corp.*, 55 F. Supp. 2d 1070, 1090 (C.D. Cal. 1999) (five-month delay); *Kolay v. Milliken*,
 18 No. 2-18-CV-00640 SVW KSX, 2018 WL 1942709, at *4 (C.D. Cal. Mar. 22, 2018) (nine-month
 19 delay).

20 None of Plaintiffs’ asserted injuries are irreparable in any event. Plaintiffs contend that
 21 “epidemiological” and “biostatistical” data may be lost. Mot. ¶¶ 51–53. But because they fail to provide
 22 any information about the alleged Coronavirus Reporter app, there is no basis to understand what
 23 “epidemiological” and “biostatistical” data are in jeopardy, how Plaintiffs’ app would preserve that data,
 24 and why such data is not already preserved by existing software, research, or governmental efforts. *See*
 25 *Wells Fargo & Co. v. ABD Ins. & Fin. Servs., Inc.*, No. C 12-3856 PJH, 2014 WL 4312021, at *10
 26 (N.D. Cal. Aug. 28, 2014) (rejecting “platitudes” of harm and denying motion for preliminary
 27 injunction due to lack of evidence). In any event, Plaintiffs do not explain how the loss of these data
 28 (if any such loss could be proved) is an injury *to them* for which they could seek any remedy. *See In*

re Apple Processor Litig., No. 5:18-cv-00147-EJD, 2019 WL 3533876, at *6–8 (N.D. Cal. Aug. 2, 2019) (dismissing claims where plaintiff had not personally suffered injury alleged).

The only asserted injury Plaintiffs identify to themselves is that their apps will not be able to “obtain sufficient market share” to earn revenue in Apple’s ecosystem. Mot. ¶ 48. But an antitrust plaintiff may seek lost profit damages and other forms of monetary relief. *Knutson v. Daily Rev., Inc.*, 468 F. Supp. 226, 229 (N.D. Cal. 1979). So even if the Court could ignore Plaintiffs’ own allegation that they intended to offer their app for free, Compl. ¶ 94, there is no evidence establishing that lost profit damages or other monetary relief would be inadequate. This was their burden, yet Plaintiffs have no evidence to show that an equitable remedy is warranted. Because Plaintiffs offer nothing more than “speculation on future harm,” they have not established a risk of irreparable injury and their motion should be denied. *Herb Reed Enters.*, 736 F.3d at 1249–50.

C. The Balance Of The Equities Favor Apple, and the Proposed Injunction Would Harm the Public Interest.

While Plaintiffs identify no irreparable injury they would suffer without an injunction, the remedy they seek here poses an incalculable risk to the public and Apple. The Apple ecosystem has been an enormous success in part because it is a curated space that consumers trust. *See Kosmynka Decl.* ¶¶ 2, 18. The injunction sought here would eviscerate that system, burdening Apple with redesigning its software infrastructure in a way that prevents the company from protecting its customers from malicious or offensive content. And it would strip Apple of its right to choose when, where, if and how to license its intellectual property.

First, the proposed injunction would inundate consumers, including children, with malware, porn, and other malicious and offensive apps. For example, Plaintiffs seek to bar Apple from rejecting any app except those that violate “local, state, national, and/or global laws and treatises [sic]” or “could reasonably likely cause device malfunction, incomplete execution, or device failure.” Dkt. 20-1 ¶ c. This would require Apple to allow consumers to download many apps that surreptitiously gather sensitive user data, such as bank records, health information, and other personal data stored on many mobile devices. It also would force Apple to distribute apps filled with virulent racial epithets or other

1 offensive stereotypes. Plaintiffs would even block Apple from rejecting apps that disseminate
 2 pornography, even though its devices are widely used by children.

3 Plaintiffs ignore these concerns, but they are not hypothetical. Apple offers better security than
 4 any competitor. Brass Decl. Ex. 2 at 2708:13–17 (Mickens). That is in large thanks to the app review
 5 process that Plaintiffs seek to enjoin, which rejects thousands of apps every week precisely because
 6 they do not meet Apple’s high standards for privacy, security, and quality. Kosmynka Decl. ¶ 2. Far
 7 from making Apple’s platform “more desirable and valuable,” Mot. ¶ 56, the remedy sought here would
 8 create a “toxic kind of a mess” where the “safe and trusted” App Store once stood—a result that is
 9 “terrible for the user” and “terrible for the developer.” Brass Decl. Ex. 2 at 3884:18–3885:11 (Mr.
 10 Cook testifying about the implications of a proposed injunction that would force Apple to distribute
 11 unreviewed apps); *see also id.* at 3885:19–3886:1 (Mr. Cook similarly explaining that Apple’s
 12 “promise of safety, security, and privacy” to users “depends on” the app review process).

13 The proposed injunction also seeks to trample Apple’s intellectual property rights. Apple’s
 14 software development tools, the App Store, and iOS itself are protected by patents, copyrights, and
 15 trademarks. Brass Decl. Ex. 9 ¶ 23. This carries with it the exclusive right to license (or not to license)
 16 that software as it determines. *See, e.g., Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d
 17 1147, 1186 (1st Cir. 1994) (explaining that because “[t]he Copyright Act expressly grants to a copyright
 18 owner the exclusive right to distribute the protected work, . . . ‘[t]he owner of the copyright, if [it]
 19 pleases, may refrain from vending or licensing and content [itself] with simply exercising the right to
 20 exclude others from using [its] property’”). Because the antitrust and intellectual property laws must
 21 be construed *in pari materia*, Apple’s intellectual property rights preclude the remedy sought here—
 22 compelling Apple to distribute apps using its intellectual property without any charge. Dkt. 20-1 ¶ d;
 23 *see also SolidFX, LLC v. Jeppesen Sanderson, Inc.*, 935 F. Supp. 2d 1069, 1082–83 (D. Colo. 2013)
 24 (rejecting Section 2 claim that would “subvert . . . the rights granted a copyright holder”). Indeed, such
 25 compelled licensing would amount to a government taking of Apple’s property for which just
 26 compensation would be required. *See James v. Campbell*, 104 U.S. 356, 358 (1881) (government
 27 cannot appropriate or use patented inventions without just compensation). At a minimum, it would
 28 significantly increase Apple’s costs, allow competitors to free-ride on the billions of dollars that Apple

1 has invested in the iOS ecosystem, and would chill Apple’s incentives to invest and innovate—to
 2 developers’ and consumers’ detriment. Brass Decl. Ex. 9 ¶¶ 61–71; Trial Tr. 3643:10–17, 3645:21–
 3 25 (*Epic* trial testimony of Apple’s expert, James Malackowski).

4 Nor can Plaintiffs ignore the burden of compelling Apple to redesign iOS. Dkt. 20-1 ¶¶ a-b.
 5 Without evidence or explanation, they brush the scope of their request aside as insignificant. Mot.
 6 ¶ 55. But overhauling iOS assuredly would require extensive software engineering, as Apple would
 7 not only have to change the fundamental code of its software but also explore new ways in which to
 8 attempt to mitigate the security and privacy risks to which its users would now be exposed. *See* Brass
 9 Decl. Ex. 2 at 2721:18–2723:16, 2732:14–24 (Mr. Schiller describing the burden of developing and
 10 changing iOS).

11 The requested injunction, in short, would do unimaginable harm; yet Plaintiffs offer no
 12 evidence that it would do any good. A court sitting in equity should not countenance such a request.

13 **D. A Preliminary Injunction May Be Issued Only If Plaintiffs Post a Bond for at least \$99
 14 Million**

15 A preliminary injunction may issue “only if the movant gives security in an amount that the
 16 court considers proper to pay the costs and damages sustained by any party found to have been
 17 wrongfully enjoined or restrained.” Fed. R. Civ. P. 65(c). This presumptively requires plaintiffs to put
 18 a bond against which the defendant can collect if they ultimately prevail. *Nintendo of Am., Inc. v. Lewis*
Galoob Toys, Inc., 16 F.3d 1032, 1036 (9th Cir. 1994). That sum is at least \$99 million here—and
 19 likely far greater.

20 Under the express terms of Plaintiffs’ proposed injunction, Apple could no longer charge
 21 developers the \$99 annual developer program fee. *See* Dkt. 20-1 ¶ d. Given that there are
 22 approximately 1 million members in the Apple Developer Program, Brass Decl. Ex. 2 at 2759:14–17,
 23 2760:10–15 (Schiller), Plaintiffs’ proposed injunction would cost Apple at least \$99 million a year in
 24 developer program fees. A \$99 million bond thus would cover only one year of the “damages
 25 sustained” by Apple from a wrongful injunction, Fed. R. Civ. P. 65(c)—a conservative estimate even
 26 if this case could be rushed to trial. Therefore Plaintiffs should be ordered to post a bond of *at least*
 27 \$99 million to pursue their request for injunctive relief.

Yet lost developer fees likely represent a small fraction of the damages Apple would suffer. The proposed injunction also would force Apple to distribute apps from developers that circumvented or otherwise refused to pay Apple its contractual commissions. Dkt. 20-1 ¶ c. These commissions make up the bulk of Apple’s revenue from the App Store, which was about \$13.5 billion in 2019, Brass Decl. Ex. 2 at 1730:17–20, and has only risen since, Brass Decl. Ex. 24 at 21. A wrongful injunction thus could inflict billions of dollars of harm to Apple. There is no indication (much less evidence) that Plaintiffs have the financial wherewithal to make good such a loss if necessary. This must be factored into the required bond as well.

In addition to lost revenue, Apple would also invariably suffer damage to its goodwill and brand when users are inundated with malware, pornography, scams, and other malicious, dangerous, and unsavory apps. *See Kosmynka Decl.* ¶ 18. What is more, the proposed injunction—which seeks to demolish Apple’s business model—could irreparably damage the attractiveness of Apple’s platform. *See Brass Decl. Ex. 3 ¶¶ 29, 120* (explaining how even slight changes to a transaction platform’s rules and prices, let alone the wholesale transformation proposed here, can lead users to quickly abandon a platform). These intangible, yet very real, potential harms should also be considered by the Court in setting the amount of the bond that Plaintiffs should be required to post before proceeding on their Quixotic quest for an injunction.

Despite the sweeping injunction Plaintiffs asked the Court to impose, and the undeniable gravity of a wrongful injunction, Plaintiffs have not offered to post *any* security. The Court should not even entertain the request for injunctive relief unless and until Plaintiffs post a bond for at least \$99 million. If they are unable or unwilling to do so, then the motion can and should be denied for that reason alone.

V. CONCLUSION

For the reasons set forth above, Apple respectfully requests that the Court deny Plaintiffs' motion for a preliminary injunction.

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Respectfully submitted,

2 By: /s/ Rachel S. Brass
3 Rachel S. Brass

4 GIBSON, DUNN & CRUTCHER LLP
5 MARK A. PERRY (SBN 212532)
6 mperry@gibsondunn.com
7 RACHEL S. BRASS (SBN 219301)
8 rbrass@gibsondunn.com
9 JULIAN W. KLEINBRODT (SBN 302085)
jkleinbrodt@gibsondunn.com
555 Mission Street, Suite 3000
San Francisco, CA 94105-0921
Telephone: (415) 393-8200
Facsimile: (415) 374-8429

10 *Attorneys for Apple Inc.*

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